Court File No: 31-1423385
Court File No: 31-1423389

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF BANKRUPTCY OF LEGACY NPC PARTNERSHIP,
of City of Toronto, in the Province of Ontario

AND IN THE MATTER OF BANKRUPTCY OF 4514858 CANADA INC.,
of the City of Toronto, in the Province of Ontario

BOOK OF AUTHORITIES OF THE MOVING PARTY (MOTION RETURNABLE JANUARY 24, 2011)

January 20, 2010

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TAB 1

2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744

Ashley v. Marlow Group Private Portfolio Management Inc.

David Ashley, Alex Chapman, Michael DePencier, Estate of Clive Bennett Mortimer, Bruce Heyland, David Williams and Xenolith (Plaintiffs) and Marlow Group Private Portfolio Management Inc., Marlow Group Securities Inc., Marlow Group Inc., Marlow Private Estate Builders Inc. and Terrence W. Marlow (Defendants)

Ontario Superior Court of Justice [Commercial List]

Mesbur J.

Heard: January 6, 2006
Judgment: January 17, 2006[FN*]
Docket: 05-CL-005797

Proceedings: additional reasons at *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 2006 CarswellOnt 3419 (Ont. S.C.J. [Commercial List])

Counsel: Tanya Pagliaroli for Plaintiffs (The "Ashley Group")

Derek J. Bell, Raj Sanhi for Receiver, A. Farber & Partners Inc.

Terrence J. O'Sullivan, M. Paul Mitchell for John Goudey, Thomas Abel, Shobana Ananth, Shane Anderson, Donald Bayer, Michael Caicco, Charles Cutts, John Coudey, Arnold H. Hochman, Mark Irwin, Gary Levy, Karen Malatest, Hamish McEwan, Pierre Meunier, Paul Oakley, Barry Reiter, Mike Stroud, Michelle Szames, Stephen Szames, James Turner, John Unger, 2044102 Ontario Inc. (The "Goudey Group")

Arnie Herschorn for Paul Benson, Brenda Benson, 145403 Ontario Inc. (The "Benson Group")

O. Pasparakis for Goodman & Company, Investment Counsel Ltd.

M. McNaughton, B. Wong for Canadian Investor Protection Fund

Roy Lee for Superintendent in Bankruptcy

Jeff Carhart, Arthi Sambasivan for Ron Eden

Subject: Insolvency; Property

Bankruptcy and insolvency --- Property of bankrupt — Property in hands of bankrupt agent or

broker — Stockbrokers

Defendant, M Inc., was investment advisor and securities dealer — Plaintiffs G Group, B Group and E were customers of M Inc. — M Inc. held securities for plaintiffs which were registered in M Inc.'s name — Receiver was appointed over M Inc.'s assets — Receiver sought order declaring that only securities registered in names of M Inc.'s customers were "customer name securities" under Part XII of Bankruptcy and Insolvency Act, and placing remainder of securities into pool fund to be shared proportionally — G Group brought cross-motion to have its securities declared customer name securities or, alternatively, to have its securities returned under trust claim — B Group and E brought motion to have their securities in limited partnership, CMP, re-registered in their names prior to bankruptcy — Motion granted; cross-motions dismissed — G Group's securities were not customer name securities — Section 253 of Act defines customer name securities as those "registered in the name of the customer" — Fact that all customer assets held by M Inc. had been identified, and that respective owners had confirmed ownership, was not equivalent to registration as contemplated by s. 253 — Proposed re-wording of s. 253 in Bill C-55, adding "or recorded in appropriate manner" to definition of customer securities, offered no assistance — Ability to identify beneficial owner did not constitute recording in appropriate manner — G Group could not assert trust claim — Under s. 261 of Act, all securities held by M Inc. at date of bankruptcy vested in trustee, except for customer name securities — There was no basis upon which B Group and E could require register of CMP to be altered, as they were not subscribers — CMP's register showed M Inc. as subscriber for units in question.

Bankruptcy and insolvency --- Consolidation orders and orderly payment of debts

Substantive consolidation of bankrupt estates — Defendant, M, was sole shareholder and officer of four corporate defendants: M Inc., S Inc., E Inc., and G Inc. — M Inc. was investment advisor and securities dealer, S Inc. was securities dealer, E Inc. was life insurance agency, and G Inc. provided management services to other three companies — All four corporate defendants shared premises, telephone, fax, bank accounts, and accounting records — Receiver brought motion for substantive consolidation of bankruptcies of four corporate defendants — Motion dismissed — Receiver did not provide evidence concerning effect of substantive consolidation on creditors of corporate defendants, and whether rights of creditor of any individual company would be adversely affected — Substantive consolidation might not be possible since Part XII of Bankruptcy and Insolvency Act applied to only two corporate defendants — Part XII clearly applied to M Inc. and S Inc., but not to E Inc., as E Inc. was not securities firm — Substantive consolidation might have unintended effect of attempting to deal with E Inc.'s bankruptcy under Part XII — Dismissal was without prejudice to motion's being renewed on further and better material.

Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment

Applicability of Part XII of Bankruptcy and Insolvency Act to proceedings — M Inc. was investment advisor and securities dealer — Receiver was appointed over M Inc.'s assets — Receiver brought motion for order that M Inc.'s bankruptcy should proceed under Part XII of Bankruptcy and Insolvency Act, on basis that M Inc. was "securities firm" under s. 258 of Act

— Motion granted — M Inc. was securities firm as defined by s. 258 — Section 258 definition includes corporations that buy and sell securities for customers in course of doing business, even if they also engage in other commercial activities — M Inc. clearly bought and sold securities for its customers, whether it did so as its primary business, or ancillary to its primary business of providing investment advice.

Cases considered by *Mesbur J.*:

Aeric Inc. v. Canada Post Corp. (1985), [1985] 1 F.C. 127, 56 N.R. 289, 16 D.L.R. (4th) 686, 1985 CarswellNat 23, 1985 CarswellNat 23F (Fed. C.A.) — considered

Associated Freezers of Canada Inc., Re (1995), 36 C.B.R. (3d) 227, 1995 CarswellOnt 944 (Ont. Bktcy.) — considered

J.P. Capital Corp., Re (1995), 31 C.B.R. (3d) 102, 1995 CarswellOnt 53 (Ont. Bktcy.) — considered

New Brunswick v. Estabrooks Pontiac Buick Ltd. (1982), (sub nom. *Estabrooks Pontiac Buick Ltd., Re)* 44 N.B.R. (2d) 201, (sub nom. *Estabrooks Pontiac Buick Ltd., Re)* 116 A.P.R. 201, (sub nom. *Fisherman's Wharf Ltd., Re)* 144 D.L.R. (3d) 21, (sub nom. *Fisherman's Wharf Ltd., Re)* 7 C.R.R. 46, 1982 CarswellNB 236 (N.B. C.A.) — considered

Vantage Securities Inc., Re (1998), 1998 CarswellBC 3138, 9 C.B.R. (4th) 169, 64 B.C.L.R. (3d) 148 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Pt. XII — considered

s. 5(4)(a) — considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] — referred to

s. 67 — considered

s. 183 — considered

s. 253 — referred to

s. 253 "courtier en valeurs mobilières" — considered

s. 253 "customer compensation body" — considered

s. 253 "customer name securities" — considered

s. 253 "securities firm" — considered

s. 255 — considered

s. 261 — referred to

s. 261(1) — considered

s. 262(1) — considered

s. 262(2.1) [en. 1997, c. 12, s. 118] — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 18 — considered

Limited Partnerships Act, R.S.O. 1990, c. L.16

Generally — referred to

s. 4(1) — referred to

Securities Act, R.S.O. 1990, c. S.5

s. 1(1) "dealer" — referred to

Regulations considered:

Limited Partnerships Act, R.S.O. 1990, c. L.16

General, R.R.O. 1990, Reg. 713

s. 3a [en. O. Reg. 11/91] — referred to

Words and phrases considered

securities firm

Part of the firm's business must be the buying and selling of securities; it may be its primary business, or it may simply be a part of its overall business. If it is, it is a "securities firm" within the meaning of Part XII [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, s. 253], in both English and French.

. . .

It is important to note that the definition of "securities firm" under the *Bankruptcy and Insolvency Act* includes a person "required to be registered to enter into securities transactions with the public". . . . However, by stating that the definition includes such persons, it must, by implication be taken to mean that the definition is not limited to such persons. Thus, the definition must include persons who need not be registered in this way.

held for a customer

Surely the plain reading of [the definition of "customer name securities" in s. 253 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985] suggests that cash and securities "held ...for a customer" must mean cash and securities held in trust or for the benefit of a customer.

MOTION by receiver for various orders pertaining to bankruptcy of four related corporate defendants; CROSS-MOTIONS by customers of one corporate defendant regarding securities held for them by that defendant.

***Mesbur J.*:**

Nature of the motion:

1 There is very little jurisprudence concerning Part XII of the *Bankruptcy and Insolvency Act*. At issue on this motion is the correct interpretation of the term "securities firm" within the meaning of Part XII of *Act*, whether trust claims can be made to cash or securities under Part XII, and whether the court should consider compelling the re-registration of certain securities on the eve of a bankruptcy.

2 If the defendants or some of them are found to be securities firms, are assigned into bankruptcy, and if Part XII of the *Bankruptcy and Insolvency Act* applies, then the court must also address whether securities held for the Goudey Group[FN1], are "customer held securities" within the meaning of s.253 of the *Act*, or whether they would fall into the "customer pool fund" for distribution among all customers on a *pro rata* basis. It must also decide if certain limited partnership units held for the Benson Group[FN2] and Mr. Eden should be registered in their names prior to a bankruptcy.

3 In addition to the analysis of these broad issues, the court must also consider receiving the Receiver's Third Report, the Supplement to it, and the Receiver's Fourth Report and approving the Receiver's activities described in them. It must also determine whether to authorize the Receiver to assign the defendants other than Terrence W. Marlow into bankruptcy, and whether, in doing so, the court should procedurally and substantively consolidate their bankrupt estates into one bankruptcy estate, so that the assets of all would form one pool against which the creditors of all could claim.

General Factual Background and the Various Stakeholders:

4 The corporate defendants collectively referred to themselves as the "Marlow Group" or the "Marlow Financial Group". The companies making up the group are Marlow Group Private Portfolio Management Inc. ("Management Inc."), Marlow Group Securities Inc. ("Securities Inc."), Marlow Group Inc. ("Group Inc.") and Marlow Private Estate Builders Inc. ("Estate Builders Inc."). I am advised that the proper name of Estate Builders Inc. is "Private Estate Builders Inc.". The title of proceedings will be amended to reflect this correction. The defendant Terrence W. Marlow is the sole shareholder, officer and director of each of these corporate entities.

5 Mr. Marlow operated the four companies out of one office, with one telephone number, one fax number, one set of staff, one bank account, and one set of poorly kept books. He referred to them collectively as Marlow Group, and used letterhead styled "Marlow Financial Group".

6 Through the companies, Mr. Marlow provided a number of investor services. Management Inc. is an investment advisor and securities dealer that was registered as an investment counsel, portfolio manager and limited market dealer with the Ontario Securities Commission (the "OSC"). Securities Inc. is a securities dealer and registered investment dealer that was registered with the Investment Dealers Association of Canada (the "IDA"). Securities Inc. was also, until it ceased to be a member of the IDA, a member of the Canadian Investor Protection Fund (the "CIPF"). Estate Builders Inc. is a life insurance agency, and Group Inc. is a management company that provided services to the other three companies.

7 Mr. Marlow was registered with the OSC as a director and advising and trading officer of Management Inc., as well as its chief compliance officer. Mr. Marlow was also registered with the OSC as a trading officer of both Management Inc. and Securities Inc. Unfortunately, Mr. Marlow apparently suffers from an addiction to crack cocaine, for which he is currently receiving rehabilitative treatment.

8 Because it was a registered investment counsel and portfolio manager, Management Inc. was required to file annual audited financial statements with the OSC within 90 days of its fiscal year ended December 31. It failed to do so following its 2003 year end. After that, the OSC imposed some conditions on Management Inc. One of these was to file a satisfactory reconciliation of its client accounts.

9 Management Inc. then hired a chartered accountant, Wally Rudensky, to help meet the OSC's demands. Mr. Rudensky's reconciliation concluded there was a significant deficiency between the actual cash that Management Inc. had in its accounts, and the amount it was supposed to be holding in trust for its clients. Mr. Rudensky concluded there would be a trust cash shortfall of about $3.3 million. As a result, the OSC immediately suspended Management Inc.'s operations until an audit was complete.

10 Mr. Rudensky worked to complete an audited version of his reconciliation. It disclosed that Management Inc. held a large number of securities for its customers, but very few of these were registered in their clients' names. Management Inc. mostly purchased large blocks of securities, and then allocated them to individual investors, although they did not register them in the clients' names. Some securities were registered in clients' names, but were held in their own personal accounts, unaffiliated with the Marlow Group.

11 The plaintiffs, who are referred to as the "Ashley Group" comprise a group of customers all of whom were essentially in a cash position at this time. They tried to reach an agreement to have Management Inc. return their securities and cash. When that failed, they moved to have the Receiver appointed. Justice Campbell made a Receivership Order on March 9, 2005, appointing A. Farber & Partners Inc. as Receiver over the corporate defendants' assets.

12 This motion began as the Receiver's motion to assign each of the corporate defendants

into bankruptcy. Ancillary to that relief, the Receiver suggests that Management Inc. is a "securities firm" as defined in section 253 of the *Act*, and, as a result, the special provisions of Part XII of the *Act* would apply to this bankruptcy. The Receiver seeks a declaration that only those securities that were actually registered, or in the process of being registered, in the name of customers are to be considered as "customer name securities". It also wishes the bankruptcies of the corporate defendants to be consolidated both procedurally and substantively, so that the assets of all would be available to the creditors of all, and the estates would be administered as one estate. In this regard, it asks the court to consider all the corporate defendants as one entity, operating as a securities firm, and subject to Part XII on bankruptcy.

13 In response to the Receiver's motion, other parties and stakeholders responded, and filed cross motions. The Ashley Group supports the Receiver's position completely.

14 The other participants on this motion are other stakeholders. The Goudey Group comprises a group of customers where were in a securities position at the time of the receivership. The Benson Group was similarly situated, as was Mr Eden. The Benson and Eden holdings were in two limited partnerships. Management Inc. holds sufficient securities to meet all its obligations to hold securities for its customers. It is only in the trust cash area that there is a significant shortfall. The Goudey and Benson Groups, along with Mr. Eden, have all brought cross-motions and oppose the Receiver's motion.

15 The Canadian Investor Protection Fund (CIFP) is a fund that covers customers of CIPF members that have suffered or may suffer financial loss solely as a result of the insolvency of a member. CIPF is a "customer compensation body" under Part XII of the *Bankruptcy and Insolvency Act*. Of all the companies making up the Marlow Group, only Securities Inc. was a CIPF member. CIPF has participated on the motion in response to the Receiver's request for a substantive consolidation of the bankruptcies of the corporate defendants.

16 Finally, the Superintendent in Bankruptcy has intervened pursuant to the provisions of section 5(4)(a) of the *Act*. The guiding principles for the Superintendent's intervention under s 5(4)(a) are set out in subsection 2 of Section VIII of the *Superintendent in Bankruptcy's Programs Effective April 1, 1994*. The guiding principle is stated as:

> The Superintendent may intervene in court under this paragraph where it is a question of national interest or importance concerning the bankruptcy process or where the Superintendent feels it is in the public interest to do so.

17 The Superintendent intervenes here to make submissions on various questions of law relating to the interpretation of Part XII of the *Bankruptcy and Insolvency Act*. The Superintendent is of the view that the legal issues of what constitutes a securities firm, whether trust claims can be advanced under Part XII of the *Act*, and whether a creditor should be able to require a re-registration of securities in order to circumvent Part XII are issues of national importance.

Positions of the various stakeholders:

18 In order to understand the motion and cross motions, it is important to understand the

positions of the various stakeholders on the various issues.

The Receiver

19 The Receiver takes the position that the corporate defendants should be assigned into bankruptcy, and that bankruptcy should proceed under the provisions of Part XII of the *Act* because Management Inc. is a securities firm as that term is defined in the *Bankruptcy and Insolvency Act*, and all the companies acted essentially as one entity. The Receiver also says that Part XII prevails in any conflict between it and any other provisions of the *Act*. For that reason, the Receiver suggests that trust claims are not permitted in security firm bankruptcies.

20 The Receiver says that apart from some shares of Stealth Minerals Ltd. actually registered in Individual clients' names, the securities that Management Inc. held for the Goudey Group, the Benson Group, and Mr. Eden are not "customer name securities" as that term is defined in the *Act*. Thus, they say that these securities should, with the remaining cash, be placed in the customer pool fund, to be shared proportionally among all the customers.

21 The Receiver says that it would be contrary to public policy to permit the Benson Group and Mr. Eden to require that their shares be transferred into their names prior to a bankruptcy, and thus convert them into customer name securities in order to avoid their pooling with those of other customers.

The Superintendent of Bankruptcy

22 The Superintendent of Bankruptcy has intervened on this motion in order to support the Receiver's interpretation of the definition of "securities firm", the Receiver's position that trust claims cannot be made to cash or securities under Part XII, and the Receiver's position that the court should not order the registration of certain securities in the names of certain investors on the eve of bankruptcy. The Superintendent says these legal issues are of national importance and require adjudication.

The Plaintiffs (the Ashley Group)

23 The Ashley Group supports the Receiver's position, and that of the Superintendent in Bankruptcy.

The Goudey Group

24 The Goudey Group puts forward a number of arguments. First, it suggests that Management Inc. is not a securities firm. Second, they say that even if it is, and Part XII applies, their securities are customer name securities, because they can be identified as "theirs". Finally, even if the securities are not customer name securities, the Goudey Group says that they can assert a trust claim to the securities which should be returned to them, and not form part of the customer pool to be shared with other investors.

The Benson Group

25 The Benson Group wants to have Benson's name and address entered on the Register

of the CMP 2003 Resource Limited Partnership and the CMP 2004 Resource Limited Partnership ("CMP"). The Benson group has added Goodman & Company, Investment Counsel Ltd. to the motion. Goodman & Company is the Manager appointed by CMP to provide investment, management, administrative and other services in relation to these two limited partnerships. The Benson Group points to these securities being a particular type of tax shelter/limited partnership investment. They say that pursuant to the Limited Partnership Agreement and the provisions of the Prospectus, Goodman & Company is required to list them as the owners of their respective percentage holdings and has failed to do so. The want the court to make an order compelling this registration, prior to the bankruptcy, in order to become customer name securities, and not fall into the customer pool fund.

Mr. Eden

26 Mr. Eden wants to be treated similarly to the Benson Group if they have success, or the Goudey Group, if they have success. Simply put, Mr. Eden wants securities to be returned to him, however that may be accomplished.

Goodman & Company

27 Goodman & Company takes no position on whether it should re-register the CMP partnership units or not. However, it denies that it has acted improperly in failing to register any CMP units in the names of the Benson Group or Mr. Eden. It says that the actual subscriber for the limited partnership units was Management Inc. and that is who is recorded as the subscriber for CMP 2003 and CMP 2004 on the Partnership Register. Goodman & Company wishes to be exonerated of any wrongdoing or impropriety.

Canadian Investor Protection Fund

28 The Canadian Investor Protection Fund has participated on this motion only to oppose the substantive consolidation of the bankruptcies. A substantive consolidation, it says, could prejudice their position. It also takes the position that there are no compelling reasons to order substantive consolidation.

The Law and analysis:

29 In order to put the issues into context, it is important to consider Part XII of the *Bankruptcy and Insolvency Act*, and its purpose. It is a relatively new part of the *Act*, having come into force in 1997, in response to what were seen as undue complexities involved in the bankruptcies of securities firms.

30 Part XII of the *Bankruptcy and Insolvency Act* was enacted to simplify and streamline the administration of a bankrupt securities firm's estate. Before Part XII, administration of these estates was time-consuming, complex, uncertain, and costly to both investors and creditors. Customers of the bankrupt firm would raise trust and tracing concepts, which proved difficult to determine. Often, while waiting for adjudication of these trust claims, the Trustee would have to continue to hold potentially volatile securities, whose value could plummet, while customers battled over their entitlement to them.

31 What Part XII does is to create a particular class of securities that are to be returned to customers. These are called "customer name securities". All other securities and cash held by the bankrupt firm are to be pooled in a "customer pool fund", and distributed among all the customers of the firm on a *pro rata* basis. It is easy to see why some customers would like to avoid the application of Part XII altogether, or, alternatively, have their securities designated as customer name securities, in order to avoid pooling them with other customers.

32 It should be noted that the customer pool fund is paid out before any creditors are paid at all. If significant securities are returned to customers and do not fall into the pool, the pool will obviously be smaller. Here, if the Receiver's position prevails, the customer pool fund of securities and cash will give all the customers a return of about 60 cents on the dollar. If the Ashley/Benson/Eden positions prevail, they will have securities returned to them, and realize about 95 cents on the dollar for their claims, while the Ashley Group customers will receive less than 5 cents on the dollar.

Bankruptcy?

33 Under the terms of the Receivership Order, the Receiver has the power to assign all the corporate defendants, apart from Securities Inc., into bankruptcy. Securities Inc.'s exclusion from this general power was made part of the Receivership Order at CIPF's request, presumably because of CIPF's particular potential obligations on the bankruptcy of one of its members. As a result, an order is required to put Securities Inc. into bankruptcy. As far as the other corporate defendants are concerned, the Receiver seeks approval of its decision to assign them into bankruptcy.

34 There is no question that all the corporate defendants are insolvent, and that it would be in the interests of all the customers and creditors for them to be assigned into bankruptcy. No one now opposes an assignment. The only issue is whether the bankruptcy should proceed under Part XII of the *Act*, or whether it should be a "regular" bankruptcy. Determination of this issue will depend on whether some or all of the corporate defendants are "securities firms", or indeed, whether the Marlow Group should be considered as a single entity which itself is a securities firm.

35 The "securities firm" issue has focused primarily on Management Inc., since it is the company that seems to holding the bulk of the securities and cash for the customers. As to the other corporate defendants, there is no question that Securities Inc. is a securities firm. It, however, has virtually no assets. Estate Builders Inc. is clearly not itself a securities firm. This may be relevant on the issue of substantive consolidation, but is essentially moot, since the company apparently has no assets either. Group Inc. simply provided management services to the other companies. It has some assets. This leaves the question of whether Management Inc. is a securities firm. If the bankruptcies are substantively consolidated, and Management Inc. is a securities firm, then presumably a consolidated bankruptcy would proceed under Part XII.

Securities Firm?

36 Section 258 of the *Bankruptcy and Insolvency Act* defines the term "securities firm" as follows:

"securities firm" means a person who carries on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal or agent, and includes any person required to be registered to enter into securities transactions with the public, but does not include a corporate entity that is not a corporation within the meaning of section 2.

37 The French version of the statute contains the following definition:

« courtier en valeurs mobilières » Toute personne, membre ou non d'une bourse de valeurs, qui achète des titres a un client ou pour celui-ci ou vend des titres a un client ou pour celui-ci, pour son compte ou en qualité de mandataire, et notamment celle qui a l'obligation de s'inscrire pour avoir le droit de conclure avec le public des opérations sur les titres, a l'exception des personnes qui sont exclues de la définition de « personne morale » a l'article 2.

38 The Goudey Group sets much store in the phrase "carries on the business" in the English definition. It takes the position that in order to qualify for treatment under Part XII, a firm's primary business must be the buying and selling of securities. It says that Management Inc. held itself out primarily as an advisor. It was registered as an investment counsel, portfolio manager and limited market dealer with the OSC. Since Management Inc. never carried on business as a limited market dealer, the Goudey Group concludes that this necessarily implies Management Inc. was no more than an investment counsel and portfolio manager, and thus cannot be considered a securities firm. While the Goudey Group concedes that Management Inc. did buy securities on their behalf, they say it was only incidental to their primary business of investment counsellors. Thus, they say Management Inc. cannot be held to be a securities firm.

39 The Superintendent points to the absence of the phrase "carries on the business" in the French version of the *Act*. Section 18 of the *Charter of Rights and Freedoms* provides in section 18 that both the English and French language versions of a Federal statute are equally authoritative. Therefore, the court must examine both to determine Parliament's intention. Each version "forms part of the context in which the other must be read".[FN3] The court must therefore find a common interpretation for both equally authoritative versions.

40 While the English version includes the term "carries on the business", the French version does not. A literal translation of the phrase "*Toute personne, membre ou non d'une bourse de valeurs, qui achète des titres a un client ou pour celui-ci ou vend des titres a un client ou pour celui-ci*", from the French version is "Every person, whether or not a member of an exchange, who buys securities from a customer or for him or sells securities to a customer or for him, ...".

41 The French version does not contain any language to suggest that buying and selling securities must be the person's *primary* business. This forms part of the context in which one must read the English version.

42 The Superintendent suggests[FN4] that "[u]nderstanding the definition of "securities firm" to include a corporation that buys and sells securities for its customers in the course of

doing business even if it also engages in other commercial activities is both a reasonable interpretation of the English version and one that is consistent with the French version". I agree.

43 The Goudey Group says that this approach is equivalent to "reading out" the phrase "carries on the business" in the English version, and thus cannot comply with the "shared meaning rule."[FN5] I disagree. What the Goudey Group really wants the court to do is to read in the word "primarily" into the English definition. There is no need to do this. When one gives the usual meaning to all the words in both English and French versions, there is no inconsistency between them. Part of the firm's business must be the buying and selling of securities; it may be its primary business, or it may simply be a part of its overall business. If it is, it is a "securities firm" within the meaning of Part XII, in both English and French. This interpretation is a reasonable interpretation of the English version, and is also consistent with the French version.

44 The Goudey Group goes on to suggest that "securities firm" should be interpreted to be consistent with the securities law definition of a securities dealer. In this regard, it points to section 1(1) of the *Securities Act*[FN6] and the definition there of the term "dealer" as "a person or company who trades in securities in the capacity of principal or agent." They point out that this definition differs from the definition of an "advisor", namely "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities." They suggest that since Management Inc. was registered as an advisor under Ontario legislation, and the Goudey Group retained Management Inc. to provide them with investment advice, Management Inc. must therefore be an advisor, not a dealer, and hence not a securities firm.

45 It would have been an easy matter for Parliament to define "securities firm" in a parallel fashion to provincial securities legislation. It did not. It has created a broad definition in Part XII. The definition carries no ambiguity.

46 Management Inc. clearly bought and sold securities for all of its customers, whether it did so as its primary business, or as ancillary to its primary business of providing investment advice. In this regard, I note that some of the customers signed Private Client Account Agreements with Management Inc. These Agreements provided: "Individual Securities, including stocks and bonds may be purchased from time to time." The Agreements authorized the Marlow Group "to place orders with brokers, investment dealers, banks or trust companies for the purchase and sale of securities."

47 It is important to note that the definition of "securities firm" under the *Bankruptcy and Insolvency Act* includes a person "required to be registered to enter into securities transactions with the public". This, no doubt, includes firms the Goudey Group describes as brokerage firms, or stockbrokers, who must, of course be registered as dealers. Such firms are firms defined as "dealers" under Ontario securities law. However, by stating that the definition includes such persons, it must, by implication be taken to mean that the definition is not limited to such persons. Thus, the definition must include persons who need not be registered in this way. This would encompass a firm like Management Inc.

48 As a result, it is clear that Management Inc. "carried on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal or agent, and includes any person required to be registered to enter into securities transactions with the public". I thus conclude they are a securities firm, and therefore Part XII will apply to their bankruptcy.

Customer Name Securities?

49 Part XII carves out a very limited class of securities that are to be returned to customers when a securities firm goes bankrupt. These are defined as "customer name securities" in section 253 in the following way:

> "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered in the name of the customer or are in the process of being so registered.

50 The Goudey Group points to the fact that the term "registered" is nowhere defined in Part XII. They suggest that as a result, it is enough for the securities to be identifiable as belonging to a customer, in order to be a customer name security. They reason that since Management Inc. made allocations of various securities among its customers, those securities can be identified as belonging to the customers. They say that Mr. Rudensky's Account Balance Reconciliation confirms that all of the customer assets held by the Marlow Group have been identified, and the respective owners of those assets have confirmed their ownership. They conclude their argument by stating that this ability to identify the respective owners is equivalent to registration, as contemplated by section 253. To bolster this position, they rely on the re-wording of the section proposed in Bill C-55[FN7] . There, the definition of customer name securities reads as follows:

> "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered or recorded in the appropriate manner in the name of the customer or are in the process of being so registered or recorded, but does not include securities registered or recorded in the appropriate manner in the name of the customer that, by endorsement or otherwise, are negotiable by the securities firm.
>
> [underlining in the original]

51 The Goudey Group suggests that this new definition clearly supports their view that it is enough simply to be able to identify the beneficial owner of a security, since this would constitute "recording in the appropriate manner" in the records of the securities firm. As a result, they say that their securities are customer name securities and must be returned to them. I disagree with this analysis.

52 In my view, the addition of the words "or recorded in the appropriate manner" in the amendments in Bill C-55 are designed to cover situations where there is no actual registration of securities, but there is another specified method of recording ownership. This, for example, would cover limited partnerships for whom the *Limited Partnership Act* requires that general

partner to maintain a record of the limited partners. This would be a name "recorded in the appropriate manner."

53 Here, there is no evidence that any particular securities were recorded in any fashion in the names of the Ashley Group. Bill C-55 offers no assistance. The Ashley Group's securities are not customer name securities. They will form part of the customer pool fund, unless they can be excluded on the basis of a trust claim.

Trust Claims allowed under Part XII?

54 The provisions of Part XII of the *Act* are paramount if there is a conflict with other parts of the *Act*. Section 255 of Part XII says:

> All the provisions of this Act, in so far as they are applicable, apply in respect of bankruptcies under this Part, but if a conflict arises between the application of the provisions of this Part and the other provisions of this Act, the provisions of this Part prevail.

55 In regular bankruptcies, section 67 of the *Act* applies. It clearly states that assets held in trust by the bankrupt do not form part of the bankrupt estate. In securities firm bankruptcies, Part XII creates a kind of "super-priority" for customers. Section 261(1) vests in the trustee any securities held by the firm itself, as well as any securities and cash held by or for the account of the securities firm for a customer. The trustee is then directed to use these securities and cash to create what is called the "customer pool fund". All other assets form what is called the "general fund".

56 By virtue of s. 262(1), the customer pool fund is allocated first to the costs of administration, if there are insufficient funds in the general fund to pay the costs, and then to distribute the balance to all the firm's customers (except deferred customers) on a *pro rata* basis. Any funds remaining after that distribution are paid into the general fund, which is disbursed according to s. 262(2.1).

57 What does the concept of the customer pool fund do to the notion of trust claims in a Part XII bankruptcy? To date, there is only one reported case in Canada dealing with this issue.[FN8]

58 In *Vantage*, Brenner J considered a Trustee's position that any trust claim to either cash or securities held by a securities firm at the date of bankruptcy vests in the Trustee. Justice Brenner held that the plain wording of the language of the section supported that view. In coming to this conclusion he considered both the plain language of the section, as well as the underlying policy of Part XII.

59 In order to discern the policy, Justice Brenner relied on an article by B.D. Turcotte, entitled "Securities Firm Bankruptcies"[FN9] . That article outlined the historical complexities of securities firm bankruptcies prior to Part XII, particularly the difficulties of sorting out ownership of, or claims to securities that securities firms generally hold in many different ways for their customers. Justice Brenner concluded:

> By passing Part XII, Parliament decided to try to simplify securities firm bankruptcies by doing away with the myriad of competing trust claims and the associated legal costs and time delays in securities firm bankruptcies. Parliament recognized that securities firms deal in principally two assets: cash and securities, and so for those two asset classes, Parliament enacted the new rules in Part XII. Under s. 261, Parliament removed the entire concept of trust law for securities (except where those securities are "customer named securities") and cash.

60 In the context of the *Vantage* case, Justice Brenner was dealing with the issue of cash. He concluded that by virtue of s. 261, all cash held by a securities firm at the date of bankruptcy vested in the trustee, not just the cash owned beneficially by the securities firm. Section 261 is equally applicable to securities, and I thus agree with Brenner J's analysis, and find that all securities held by a securities firm at the date of bankruptcy vest it the trustee, not just the securities owned beneficially by the firm. The only exclusion from the pool is those securities that fall into the definition of "customer name securities". Surely the plain reading of the section suggests that cash and securities "held ...for a customer" must mean cash and securities held in trust or for the benefit of a customer. If cash and securities held in trust for a customer are to vest in the trustee in a securities firm bankruptcy, then clearly this provision is in conflict with the general provisions of section 67 that exclude trust assets from the estate. Since there is a conflict, Part XII prevails, and trust claims must be prohibited.

61 Since I have held that Management Inc. is a securities firm, the Goudey Group's securities are not customer name securities, and have also found that they cannot assert a trust claim to them, their securities must vest in the trustee, and form part of the customer pool. This addresses the Goudey Group motion. I turn now to the arguments advanced by the Benson Group and Mr. Eden.

Require registration of the Benson Group and Eden securities?

62 The Benson Group and Mr. Eden were also Management Inc. customers. They invested in two limited partnerships, CMP 2003 Resource Limited Partnership and CMP 2004 Resource Limited Partnership ("CMP"), as well as earlier CMP Limited Partnerships for prior years. The CMP limited partnership units are not registered in the Benson Group or Mr. Eden's names. They say their units should be registered in their names, and ask the court to require Goodman & Company to effect this registration, before any bankruptcy occurs. This, of course, would make their CMP units customer name securities that would be returned to them, since they would be registered in their names prior to bankruptcy.

63 Simply put, the Benson Group and Mr. Eden say that both the Limited Partnership Agreement and the *Limited Partnership Act*[FN10] require that the names and addresses of all limited partners of the Limited Partnership must be registered in the records of the limited partnership. They also say that Prospectuses for these two limited partnerships state that shares will be registered in the name of a partner, if the partner requests it. They say they have a right to demand registration, and they are doing so now. They go further, and say that Goodman & Company has acted improperly in failing to maintain their names as owners in the records, and further, has made a misrepresentation in the prospectus, namely that it would keep

a record of the limited partners.

64 The Benson Group and Mr. Eden say that in the years before 2003, their investments in the CMP limited partnerships for the prior years were registered in their names. They also received their expected tax benefits from the investments, received tax receipts, and were acknowledged by the Limited Partnerships to be limited partners.

65 In the years since, they also received their expected tax receipts for CMP 2003 and 2004. They say that the Receiver says Marlow's records show Marlow was holding 4500 CMP units on behalf of its customers. They point to these facts to support their view that they must therefore be limited partners of the 2003 and 2004 CMP limited partnerships, and thus are entitled to registration of their interests. This will make the investments customer name securities.

66 Goodman & Company points out that as far as CMP and its records are concerned, in prior years, the Benson Group and Eden subscribed for the partnership units in their own names. They were recorded as limited partners for these investments. However, it was Management Inc. that subscribed for units in CMP 2003 and 2004. In compliance with its obligations under the *Limited Partnership Act*, and the Limited Partnership Agreement, CMP kept registers for unit subscribers for CMP 2003 and 2004. These register show Management Inc. as the subscriber for these units.

67 As it did for many other securities, Management Inc. purchased blocks of CMP as subscriber, and was thus registered as the holder in its own name. It later allocated them to clients. In my view, this puts the CMP units in exactly the same position as the other securities, which I have found, are not customer name securities. Although the Benson Group and Eden do not assert a trust claim to the CMP units, it is clear to me, on the basis of who subscribed for the units, that Management Inc. was the registered holder, and held the units in trust for the Benson Group and Eden. I see no basis upon which they can require the register to be altered, since they were not the subscribers for these units. I deny their request on this basis. As a result, I need not address whether there are also public policy grounds upon which to deny it as well.

68 This leaves the last issue; that is whether there should be both a procedural and substantive consolidation of the bankruptcies of the corporate defendants, essentially treating them as one bankruptcy of one securities firm.

Procedural and Substantive Consolidation?

69 All the stakeholders support procedural consolidation of the bankruptcy of all the corporate defendants. No one opposes a substantive consolidation apart from the CIPF. In order to assess its position, it is important to consider what the effect of a substantive consolidation would be.

70 Essentially, a substantive consolidation would treat all of the corporate defendants as one entity. The assets of each would fall into one common pool, to be shared by all their creditors on a *pari passu* basis.

71 There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. It is common ground, however, that the court has the authority to do so under its equitable jurisdiction under section 183 of the *Act*.

72 Few Canadian cases have dealt with substantive consolidation, although the American courts have written extensively on the subject, setting out various, and disparate, tests to support an order for substantive consolidation. We have no such assistance here.

73 The Receiver seeks a substantive consolidation for a number of reasons. Just as it said the "Marlow Group" as a whole should be treated as a securities firm, so it says, the four corporate defendants should be treated as one legal entity for the purposes of bankruptcy. They say it is appropriate to consolidate bankrupt estates in order to avoid multiplicity of proceedings, and where the bankrupt companies have shared or pooled resources, assets, and bank accounts. Also, they say where related companies are organized in an intertwined manner, it will be reasonable that the estates be dealt with *en bloc* to realize the greatest value for all interested parties.[FN11]

74 The Receiver goes on to say that all four companies operated as an interrelated entity, with shared premises, telephone, fax, bank accounts and accounting records. The Receiver says that they were operated as a single, consolidated enterprise, and should be treated as such for bankruptcy purposes, because to do so would be most expedient and cost-effective.

75 What emerges from the few Canadian cases, however, is that although expediency is an appropriate consideration in deciding whether to grant consolidation, it should not be done at the expense or possible prejudice of any particular creditor.[FN12] I take this to include any possible prejudice to someone like the CIPF, which as a customer compensation body under the *Act* has some concerns about possible additional expose to claims if there is substantive consolidation, and all creditors, and perhaps customers, then have potential claims against Securities Inc, and thus against the Fund. While there is no evidence of this actually occurring, it is a concern.

76 CIPF also points out that the Receiver wishes to use the only assets of Securities Inc., some cash, to fund the bankruptcy, and thus there is no practical advantage to any of Securities Inc.'s creditors to having a substantive consolidation of all the estates.

77 CIPF says that substantive consolidation profoundly affects the substantive rights of debtors and creditors, and thus should be considered an extreme remedy and carefully scrutinized. It involves more than procedural convenience, which of course can be accomplished by the procedural consolidation that everyone supports.

78 The Receiver has not provided evidence concerning the effect on all the creditors of all the corporate defendants if there is a substantive consolidation, and whether this will adversely affect the rights of any creditor of any individual company. Without that evidence, I cannot determine whether a consolidation would occur at the expense or to the prejudice of any particular creditor. I echo the concerns of Chadwick J in *J.P. Capital Corp., Re*[FN13] where he stated:

> I am concerned with consolidating the actions which will provide for pari passu distribution without knowing the effect that such an order will have on all creditors. Although expediency is an appropriate consideration it should not be done at the possible prejudice or expense of any particular creditor.

79 I am also concerned about whether there can be a substantive consolidation where Part XII clearly applies to two of the bankrupt companies (Management Inc. and Securities Inc.), but not to Estate Builders Inc. It is a life insurance agency — there is no suggestion that it is also a securities firm. Because of this, I am not persuaded, on the record I have, that all four companies should be treated as a single securities firm for the purposes of Part XII. This has an impact on the claim for consolidation. Although Estate Builders Inc. may not have any assets, or indeed any creditors, substantive consolidation may have the unintended effect of attempting to deal with Estate Builder's bankruptcy under Part XII. Counsel for the receiver was not able to provide me with sufficient evidence to address either of my concerns.

80 For these reasons, the motion for substantive consolidation is dismissed, without prejudice to its being renewed on further and better material. The motion for procedural consolidation of all the corporate bankrupt estates is granted.

Receiver's Third and Fourth Reports

81 There is no objection to the receipt of the Receiver's Third Report, the Supplement to it, and the Receiver's Fourth Report. There is no objection to approving the actions taken by the receiver to date. Accordingly, an order will go as requested in that regard.

82 The receiver raised an issue concerning paragraph 28 of the Receivership Order. It is of particular relevance now, given my disposition of the motion for substantive consolidation. That paragraph relates to the Receiver's use of the assets of Securities Inc. The only asset Securities Inc. has is cash of about $120,000. The Receiver needs access to this money in order to fund its fees as the Trustee on the bankruptcies. Without substantive consolidation, this may create some difficulty. No one opposes these funds being used by the Trustee to administer all the estates. An order will therefore go deleting paragraph 28 of the Receivership Order so that the receiver can access all the money in Securities Inc. to cover trustee's fees on the procedurally consolidated bankruptcy of the corporate defendants.

Disposition:

83 For all these reasons, an order will go as follows:

> (a) Receiving the Third Report of the Receiver dated August 15, 2005, the Supplement to the Third report of the Receiver dated August 17, 2005, and the Fourth Report of the Receiver dated September 30, 2005, and approving the activities of the Receiver set out in them;
>
> (b) Authorizing and directing the Receiver to assign all of the corporate defendants into bankruptcy, and that A. Farber & Partners Inc. shall be the trustee in bankruptcy ("Trustee");

(c) The bankruptcy estates of the corporate defendants shall be procedurally consolidated and administered together;

(d) Dismissing the Receiver's motion for substantive consolidation, without prejudice to its being renewed on further and better material;

(e) The bankruptcies of Management Inc. and Securities Inc. will proceed under Part XII of the *Bankruptcy and Insolvency Act*;

(f) The Goudey Group's motion to have certain securities declared to be customer name securities, or alternatively for a trust to be imposed on them and their being returned is dismissed;

(g) The Benson Group's and Eden's motion for the re-registration of CMP 2003 and 2004 Limited Partnership units into their names is dismissed;

(h) Declaring the 3,346,667 shares in the capital of Stealth Minerals Limited described in paragraph 7 of the Third Report are the only "customer name securities" held by Management Inc. and Securities Inc., and that the remainder of the securities they hold are not customer name securities and shall be grouped into either the "customer pool fund" or the "general fund" as appropriate in accordance with Part XII of the *Bankruptcy and Insolvency Act*;

(i) Deleting paragraph 28 of the Receivership Order of Campbell J. dated March 9, 2005;

(j) That the Trustee shall be authorized to sell sufficient securities and any other property from the bankruptcy estates in order to realize up to $250,000 of net proceeds to fund the costs of the bankruptcy, including without limitation the fees and costs of the Trustee and its counsel, and that the Trustee may apply to the Court at any time and from time to time to sell any further securities or other property from the bankruptcy estate as it may deem necessary to fund the ongoing costs of the bankruptcy;

(k) That after the assigning the corporate defendants into bankruptcy, the Receiver is authorized and directed to bring a motion before this Court to terminate the Receivership in respect of the corporate defendants and to seek approval of its final statement of receipts and disbursements as Receiver, including approval of its fees and costs and fees and costs of its counsel and the costs payable from the estate pursuant to the Order of this Court made on March 9, 2005 to counsel for the Plaintiffs and to seek a discharge of the Receiver in respect of the corporate defendants;

(l) That the Receiver and the Trustee, upon its appointment, shall incur no liability or obligation as a result of the carrying out the provisions of this Order, except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by the Order dated March 9, 2005, or by section 14.06 of the *Bankruptcy and Insolvency Act*, or any other applicable legislation.

(m) Amending the title of proceedings to change the name "Marlow Private Estate Builders Inc." to "Private Estate Builders Inc.".

84 If the parties are unable to agree on the disposition of costs of the motion and cross motions, they may make brief written submissions to me. The Receiver's are to be delivered within 15 days of the release of these reasons, with all other parties delivering their responses within 15 days following.

Order accordingly.

FN* Additional reasons at *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 2006 CarswellOnt 3419 (Ont. S.C.J. [Commercial List]).

FN1 John Goudey, Thomas Abel, Shobana Ananth, Shane Anderson, Donald Bayer, Michael Caicco, Charles Cutts, John Coudey, Arnold H. Hochman, Mark Irwin, Gary Levy, Karen Malatest, Hamish McEwan, Pierre Meunier, Paul Oakley, Barry Reiter, Mike Stroud, Michelle Szames, Stephen Szames, James Turner, John Unger, and 2044102 Ontario Inc.

FN2 Paul Benson, Brenda Benson and 145403 Ontario Inc.

FN3 *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201 (N.B. C.A.), at paragraph 19, and *Aeric Inc. v. Canada Post Corp.* (1985), 16 D.L.R. (4th) 686 (Fed. C.A.) at p. 707

FN4 Superintendent's factum, paragraph 12

FN5 see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at 80

FN6 R.S.O. 1990 c. S.5

FN7 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*

FN8 *Vantage Securities Inc., Re* (1998), 9 C.B.R. (4th) 169 (B.C. S.C. [In Chambers])

FN9 (1997) 17:3 *Insolvency Bulletin* 75

FN10 See s. 4(1) of the *Limited Partnership Act*, R.S.O. 1990 c. L.16, and s. 3a of Regulation 713 made under the *Limited Partnership Act*

FN11 *J.P. Capital Corp., Re* (1995), 31 C.B.R. (3d) 102 (Ont. Bktcy.), and *Associated Freezers of Canada Inc., Re*, [1995] O.J. No. 2862 (Ont. Bktcy.)

FN12 *Associated Freezers of Canada Inc., Re*, above, at paragraph 5

FN13 Note 10, above, at paragraph 19

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TAB 2

1995 CarswellOnt 53, 31 C.B.R. (3d) 102

J.P. Capital Corp., Re

RE BANKRUPTCY AND INSOLVENCY ACT

AND RE BANKRUPTCY OF J.P. CAPITAL CORPORATION (Bankruptcy Court File No. 074183)

AND RE BANKRUPTCY OF JOSE PEREZ (Bankruptcy Court File No. 073885)

AND RE BANKRUPTCY OF J.P. CORPORATION (Bankruptcy Court File No. 073910)

Ontario Court of Justice (General Division), In Bankruptcy

Chadwick J.

Judgment: February 28, 1995
Docket: Docs. Ottawa 074183, 073885, 073910

Counsel: *Denis J. Power, Q.C.*, for trustee Deloitte & Touche Inc. *Martin Z. Black*, for bankrupt Jose Perez.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Administration of estate — Trustees — Legal proceedings by trustee.

Administration of estate — Consolidation of estates — Trustee seeking order consolidating three estates and deeming creditors entitled to share pari passu on dividend arising from any realization of assets — Application dismissed without prejudice to trustee to apply once clearer identification of corporate structure, assets and effect of pari passu distribution made.

The individual bankrupt controlled two companies. Shortly before their bankruptcies, the companies were restructured and the individual distanced himself from control of the companies. The trustee in bankruptcy of the three bankrupt estates applied for an order consolidating the estates under one title of proceedings. The trustee also sought an order providing that any realization of assets arising from any of the three estates should be shared pari passu among the creditors of the three estates. The individual bankrupt opposed the application.

Held:

The application was dismissed without prejudice to the trustee to renew the application upon the resolution of certain problems.

There is no specific provision in the *Bankruptcy and Insolvency Act* for the consolidation of actions. However, the general provisions in s. 4 of the Act and the *Rules of Civil Procedure* and *Courts of Justice Act* (Ont.) provide for consolidation in order to avoid multiplicity of proceedings, provided that there are common questions of fact and law or the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences.

In this case, the application went beyond the mere consolidation of the estates. It also proposed that the assets of the various estates be intermingled. The *Rules of Civil Procedure* and the *Courts of Justice Act* do not provide for the intermingling of assets and distribution from a common pool of funds. The situation was complex. The two bankrupt companies had always maintained separate and distinct bank accounts and acted as separate legal entities. The third bankrupt estate was that of an individual. A consolidation of the estates would undoubtedly make the administration easier; however, without a clearer identification of the corporate structure, assets and possible effect of a pari passu distribution, such an order might result in prejudice to certain creditors.

Cases considered:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36 (Que. S.C.) — *distinguished*

Chemical Bank New York Trust Co. v. Kheel, 369 F. 2d 845 (2d Cir., 1966) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 4

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 138

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Application by trustee in bankruptcy for order consolidating three bankrupt estates under one title of proceedings.

Chadwick J.:

1 The trustee in bankruptcy of the above three bankrupt estates seeks an order consolidating the three estates under one title of proceedings. Further they seek an order that any realization of assets in any of the three bankruptcies shall be deemed to be for the credit of the consolidated proceedings with the intent that all creditors, regardless of which proceeding under which they filed proofs of claim, shall be entitled to share dividends on a pari passu basis in the division of such assets.

2 The application is opposed by counsel on behalf of the bankrupt, Jose Perez, and others.

3 At one time, the two bankrupt companies were controlled by the bankrupt Jose Perez. Shortly before the bankruptcies, there was a restructuring of the corporations and the individual bankrupt Jose Perez distanced himself from the control of these corporations.

4 Beside the bankrupt corporations there are a number of other related corporations which are not part of the bankrupt estate, but in some cases, are creditors of the bankrupt estates.

5 Counsel for the trustee acknowledges that there is no authority in the provisions of the *Bankruptcy and Insolvency Act* ["B.I.A."] to provide for consolidation other than the general provisions of the Act.

6 Section 4 B.I.A. states:

> The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the act or these rules, insofar as it is applicable and not inconsistent with the act or these rules, apply to all proceedings under the act or these rules.

7 The *Courts of Justice Act*, s. 138 and the rules of practice, r. 6.01(1) attempt to avoid multiplicity of proceedings and provide for the consolidation of actions. The rule provides that there must be a common question of fact or law or the relief claim arises out of the same transactions or occurrences or a series of transactions or occurrences.

8 In *Re A. & F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36, Greenberg J. of the Quebec Superior Court dealt with a similar application. In that case there were five bankrupt companies, and twenty-one related companies that were not bankrupt but an interim receiver had been appointed. The five bankrupt companies were operated as one company with an intermingling of customer lists, bank accounts and assets without any separate corporate identity. In addition, the twenty-one companies that were not bankrupt also operated in a similar manner; there was a total intermingling of assets, operations, creditors and liabilities of all twenty-six companies.

9 The trustee brought a motion seeking the consolidation and the administration of five bankrupt estates. The registrar in bankruptcy dismissed the motion and on appeal Greenberg J. allowed the consolidation order to issue.

10 Greenberg J. acknowledged that there was no provision in the B.I.A. for consolidation of actions, but reviewed the American authorities and in particular an article in Cal. L. Rev.,

vol. LXV, p. 720 entitled "Flow-of-Assets Approach". The article referred to an American case in *Chemical Bank New York Trust Co. v. Kheel*, 369 F. 2d 845 (2d Cir., 1966) where there was a similar situation where the companies paid no attention to the formalities of a corporation and operated by intermingling all the assets and accounts and were controlled by the same board of directors. In allowing the appeal, Greenberg J. stated at p. 44:

> There is also the consideration that in Bankruptcy matters the Court exercises an equitable as well as a legal jurisdiction, and that practicality is always the order of the day. It is frequently said in the jurisprudence that the Act is a "businessman's law" and that practical business considerations should not be disregarded, as they sometimes are in other domains where a strict interpretation of the law must be followed and observed.

11 I am satisfied that the general provisions of s. 4 of the B.I.A. and the *Rules of Civil Procedure* and the *Courts of Justice Act* in Ontario provide for consolidation of actions in order to avoid multiplicity of proceedings providing there are common questions of fact and law or the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences.

12 This consolidation application goes further than to consolidate for the purpose of avoiding multiplicity of proceedings and actually intermingles the assets of the corporate bankrupt into one common pool to be distributed on a pari passu basis. Rule 6.01(1) and s. 138 of the *Courts of Justice Act* do not provide for an intermingling of assets and distribution from a common pool of funds.

13 The situation in this application differs somewhat from the facts in *Re A. & F. Baillargeon Express Inc.* in that the two bankrupt corporations maintained distinct and separate bank accounts and have acted as separate legal entities.

14 The other distinguishing factor is that Jose Perez, as an individual, may be in a different position relating to his discharge and that of the corporate bankrupts.

15 A number of the major unsecured creditors are creditors in both estates and some claim guarantees over against the bankrupt Jose Perez. The majority of the creditors although served with this motion have not appeared and in fact have consented to the consolidation.

16 I accept the evidence of Chris St. Germain, senior manager at Deloitte & Touche with reference to the fact that the consolidation of the actions will make the administration easier and no doubt in the long run, will probably save administrative fees.

17 My concern at this time is we are dealing with an extremely complex bankruptcy involving and touching on a number of companies and assets. Cross-examination of various people have been conducted over the past three or four months and have not yet been concluded. The actual corporate structure of the various companies and the tracing of assets in relationship to the parties is clearly in issue.

18 I am concerned with consolidating the actions which will provide for pari passu distri-

bution without knowing the effect that such an order will have on all creditors. Although expediency is an appropriate consideration it should not be done at the possible prejudice or expense of any particular creditor.

19 Under the circumstances the application for consolidation is dismissed without prejudice to the trustee to renew the application once there has been a clearer identification of the corporate structure, the assets, and the effect a pari passu distribution would have on the unsecured creditors.

Application dismissed.

END OF DOCUMENT

TAB 3

1993 CarswellQue 49, 27 C.B.R. (3d) 36

A. & F. Baillargeon Express Inc., Re

Re bankruptcy of each of A. & F. BAILLARGEON EXPRESS INC., WESTERN CRATING & MOVING LIMITED, KENWOOD'S MOVING & STORAGE (1986) INC., A. & F. BAILLARGEON EXPRESS (CANADA) INC., and BORISKO BROTHERS MOVING INC. (debtors); RICHTER & ASSOCIATES INC. (trustee-petitioner)

Quebec Superior Court, Bankruptcy and Insolvency Division

Greenberg J.

Judgment: May 28, 1993
Docket: Docs. S.C. Montreal 500-11-000476-933, 500-11-000519-930, 500-11-000520-938, 500-11-000477-931, 500-11-000478-939

Counsel: *Mark Schrager*, for trustee-petitioner.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Trustees — Legal proceedings by trustee.

Practice — Consolidation of administration of bankrupt estates — Twenty-six companies forming highly complex group and intermingling assets, operations and liabilities as though they were one company — Five companies in group being bankrupt — Practical approach being appropriate — Expenses of bankruptcy likely to increase if trustee required to administer each of five companies separately — Consolidation of administration of bankrupt estates ordered.

Procédure — Consolidation de l'administration des actifs de sociétés faillies — Vingt-six sociétés formant un regroupement complexe et confondant leurs actifs, opérations et responsabilités comme s'il ne s'agissait que d'une seule compagnie — Cinq sociétés faillies au sein du groupe — Approche pratique étant appropriée — Frais de la faillite susceptibles d'augmenter si le syndic est tenu d'administrer chacune des cinq sociétés séparément — Consolidation de l'administration des actifs des sociétés faillies ordonnée.

The appellant was appointed trustee for each of the five bankrupt companies, as well as interim receiver for 21 other companies. All those companies formed a highly complex group. The five bankrupt companies operated as if they were one, with no distinction as to their custom-

ers, banks and assets, and with total disregard for corporate identity and separate judicial personalities. The 26 companies held only four operating bank accounts and one concentration account into which all moneys funnelled through other accounts. There was a total intermingling of assets, operations and liabilities. As interim receiver, the trustee was responsible for collecting the receivables of the 21 non-bankrupt companies.

The trustee brought motions seeking the consolidation of the administration of the five bankrupt estates. The registrar dismissed the motions and the trustee appealed.

Held:

The appeal was allowed.

The concept of protection incorporated into Canadian bankruptcy law in the recent major amendments to the *Bankruptcy and Insolvency Act* (the "Act") justified the court to refer to, and to some extent rely upon, American jurisprudence and authorities, as opposed to the traditional reference to British bankruptcy law and authorities.

In that context, the following statement must be considered in consolidation matters: "If the relationships between affiliates are so obscured that it is impossible to disentangle their affairs, of course their bankruptcy proceedings should be consolidated. In such a situation, even a simplistic reliance argument could not seriously be advanced."

The trustee testified that the records had become hopelessly confused and in many instances were non-existent, so that it was impossible to identify which fixed assets belonged to which of those companies. Also, the customers were billed by whichever company management deemed would be the most expedient.

It was extremely unlikely that there would be any dividend for ordinary creditors but, to the extent that there was any possibility, it was important that the secured creditors realize the maximum possible on their claim. Therefore, if the trustee was required to perform a separate body of work in respect of each of the five companies separately, the expenses of the bankruptcy would be increased and the realization by the secured creditors would be reduced, thereby diminishing the already faint hope of any dividend to the ordinary creditors.

The concern that one creditor might receive an advantage because of the consolidation while another was disadvantaged was diminished by the fact that the likelihood of realization was remote and that it would have been an unnecessary waste of money, time and effort to oblige the trustee to go through the full exercise in respect of each one of those five companies.

The trustee brought the motions in order to be able to have one consolidated list of creditors for the purpose of sending the notice of the calling of the first meeting of creditors, since it would have been nearly impossible to distinguish which creditors related to which specific one of those five companies. The Act contains no statutory provisions dealing with consolidations, nor does the United States *Bankruptcy Act*. However, courts in the United States have adopted that approach when it is necessary and where to do otherwise would be impractical.

Also, the *Companies' Creditors Arrangement Act* does not contain a statutory provision authorizing consolidation, but it has been permitted where companies' affairs were intermingled in a similar fashion.

In bankruptcy matters, the court exercises an equitable as well as a legal jurisdiction and practicality is always necessary. The Act is a businessmen's law and practical business considerations should not be disregarded.

The registrar did not err in his judgment since he did not have the chance to consider the evidence presented on appeal as well as the arguments in law and the jurisprudence, both Canadian and American.

If a creditor feels unjustly prejudiced by the consolidation, it may petition the court pursuant to s. 187(5) of the Act to have the judgment modified, varied, rescinded or otherwise dealt with and the notice to all creditors would contain such information.

. . . . .

L'appelante a été nommée syndic de chacune des cinq sociétés faillies, et séquestre intérimaire de 21 autres sociétés. Toutes ces compagnies formaient un regroupement extrêmement complexe. Les cinq sociétés faillies fonctionnaient comme s'il ne s'agissait que d'une seule compagnie, sans faire de distinction quant à leurs clients, leurs institutions bancaires ou leurs actifs, et sans tenir compte des identités corporatives et personnalités juridiques distinctes de chacune. Les 26 sociétés ne détenaient que quatre comptes d'opérations bancaires et un seul compte consolidé réunissant tout l'argent provenant des autres comptes. Les actifs, opérations et responsabilités étaient entièrement entremêlés. En sa qualité de séquestre intérimaire, le syndic avait la responsabilité de percevoir les comptes recevables des 21 sociétés non faillies.

Le syndic a présenté des requêtes afin que soit ordonnée la consolidation de l'administration des actifs des cinq sociétés faillies. Le registraire a rejeté les requêtes et le syndic en a appelé de cette décision.

Arrêt:

Le pourvoi a été accueilli.

La notion de protection incorporée au droit de la faillite au Canada par les modifications récemment apportées à la *Loi sur la faillite et l'insolvabilité* (la "Loi") justifiait la Cour de référer et, dans une certaine mesure, de s'en remettre à la jurisprudence et à la doctrine américaines, par opposition au renvoi traditionnel au droit de la faillite britannique.

Dans ce contexte, il faut tenir compte de la proposition suivante en matière de consolidation : [Traduction] "Si les rapports existant entre des entreprises affiliées sont tellement embrouillés qu'il est impossible de démêler leurs affaires, alors les procédures de faillite qui les concernent devraient être consolidées. Dans une telle situation, même le plus simple argument de confiance ne pourrait sérieusement être invoqué."

Le syndic a déclaré que les dossiers étaient devenus désespérément confus et, dans plusieurs

cas, littéralement inexistants, de sorte qu'il était impossible d'identifier à laquelle de ces sociétés appartenaient les immobilisations. De plus, les factures adressées aux clients provenaient de la société considérée comme étant la plus expéditive.

Il était très peu probable qu'un dividende puisse être versé aux créanciers ordinaires mais, dans la mesure où cela demeurait possible, il était important que les créanciers garantis réalisent le plus gros montant possible de leurs réclamations. Par conséquent, si le syndic se voyait obligé d'exécuter des tâches distinctes pour chacune des cinq sociétés prises séparément, les frais de la faillite augmenteraient et la réalisation des créanciers garantis diminuerait, réduisant ainsi l'espoir déjà précaire qu'un dividende soit éventuellement versé aux créanciers ordinaires.

La crainte qu'un créancier soit avantagé par la consolidation au détriment d'un autre créancier était tempérée par le fait que la probabilité de la réalisation était assez éloignée, et que le fait d'obliger le syndic à effectuer toutes ces tâches pour chacune des cinq sociétés individuellement aurait entraîné une perte inutile d'argent, de temps et d'énergie.

Le syndic a présenté ces requêtes afin de n'avoir qu'une seule liste consolidée des créanciers lorsqu'il serait temps d'envoyer l'avis de convocation de la première assemblée des créanciers, puisqu'il aurait été virtuellement impossible de distinguer à laquelle des cinq sociétés spécifiquement était lié chacun des créanciers. La Loi ne comporte aucune disposition statutaire concernant les consolidations, non plus que la loi américaine sur la faillite. Toutefois, les tribunaux des États-Unis ont adopté cette approche lorsque cela s'avérait nécessaire, et lorsqu'une autre méthode se serait avérée peu pratique.

Par ailleurs, la *Loi sur les arrangements avec les créanciers des compagnies* ne comporte aucune disposition statutaire autorisant la consolidation, bien qu'elle ait été permise dans des cas où les affaires de sociétés étaient confondues de façon similaire.

En matière de faillite, la Cour exerce une juridiction d'équité aussi bien que juridique, et l'aspect pratique est toujours important. La Loi est une loi d'hommes d'affaires, et des considérations d'affaires pratiques ne devraient pas être négligées.

Le registraire n'a pas fait erreur en rendant sa décision puisqu'il n'a pas eu l'opportunité de se pencher sur la preuve soumise en appel, ni sur les arguments invoquant la loi et la jurisprudence, canadiennes et américaines.

Si un créancier devait se considérer injustement désavantagé par suite de la consolidation, il pourrait toujours présenter à la Cour une requête en vertu du par. 187(5) de la Loi afin que le jugement soit modifié, annulé ou autrement révisé, et l'avis aux créanciers comporterait une mention à cet effet.

Cases considered:

Chemical Bank New York Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1996) — *considered*

*Northland Properties Ltd., Re, (*sub nom. *Northland Properties Ltd. v. Excelsior Life In-*

surance Co. of Canada) 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *applied*

Statutes considered:

Bankruptcy Act (U.S.).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 183

s. 187(5)

s. 192(4)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Appeal from registrar's decision to dismiss trustee's motions seeking consolidation of administration of five bankruptcy estates.

***Greenberg J.* (orally):**

1 In the five bankruptcy files which appear on today's Roll and which we will now enumerate: A. & F. Baillargeon Express Inc., Western Crating & Moving Limited, Kenwood's Moving & Storage (1986) Inc., A. & F. Baillargeon Express (Canada) Inc. and Borisko Brothers Moving Inc., each of those companies has been declared bankrupt and Richter & Associates Inc. named as Trustee.

2 Those five companies, together with twenty-one others not in bankruptcy, form together what is commonly referred to in the moving trade as the "Baron Group of Companies" and, technically, the parent company bears the name "Baron Moving Systems Inc."

3 The Trustee had petitioned the Registrar of the Court to order the Consolidation of the administration of those five bankruptcy estates, and all five Motions were dismissed by the Registrar on May 26th last. The Trustee now comes before this Court on appeal from those decisions in virtue of s. 192(4) of the *Bankruptcy and Insolvency Act*,[FN1] hereinafter "the Act".

4 The organigram of the group of twenty-six companies was filed as Exhibit R-1 and is, to say the least, a highly complex one. It has also been proven by the Exhibits and the testimony of the representative of the Trustee that, in the language of the trade, these five companies comprised the "Montreal Branch" in the case of three of them and the "Toronto Branch" in the case of the two others. The three in the first instance, the Montreal Branch, were A. & F. Baillargeon Express Inc., Western Crating & Moving Limited and Kenwood's Moving & Storage (1986) Inc., and the Toronto Branch consisted of the other two companies, A. & F. Baillargeon Express Canada Inc. and Borisko Brothers Moving Inc.

5 It has been demonstrated in the evidence that these five companies operated as if they

were one, indistinctly as to their customers, their bank and their assets, with intermingling; trucks being registered with the Provincial authorities as being the property of one company and yet appearing on the books of another, and moves being booked and executed by one company or another and billed by even a third. There was a total disregard for the niceties of corporate identity and separate juridical personalities.

6 The leading Exhibit in that regard is Exhibit R-2, which is the "Joint Banking Agreement" between the Canadian Imperial Bank of Commerce (hereinafter "the CIBC") and the companies enumerated therein. We note with interest that, even though there is in that Agreement a list of those twenty-six companies, there are among them only four operating accounts with that Bank, so that certainly it is not true to say that each company had its own bank account, which again is in keeping with the total intermingling of assets, operations, liabilities, etc.

7 Part II of that Schedule is entitled the "Concentration Accounts" and indicates only the name of the lead borrower, Baron Moving Systems Inc. & al. Hence, Baron Moving Systems Inc., as the lead borrower, is the only company of the Group which operated a "Concentration Account". It has been explained in evidence and argument how this account is the "nest to which all the robins returned", and this is the resting place of all monies funnelled through other accounts and that, in effect, it is as though we were dealing with only one company.

8 In respect of the other twenty-one not-bankrupt companies of the group of twenty-six, and not therefore among the five companies in respect of which the Trustee now petitions this Court, the Court has previously appointed the same Trustee in the capacity of Interim Receiver, but with powers and seizin limited only to the collection of the accounts receivable.

9 All of those accounts receivable are part of the security of the CIBC, which had invited in the Bank of Nova Scotia as a co-participant, and the latter bank was co-Petitioner on the Bankruptcy Petitions. Accordingly, it is only in respect of the five bankrupt companies that the present proceedings are taken, but the same Trustee is proceeding, as Interim Receiver, to collect the receivables of the other twenty-one companies as well.

10 Traditionally, until the recent major amendments to the Act, Canadian bankruptcy law has been inspired by British bankruptcy law. Thus, it has been common to refer to British authorities and only less frequently to American authorities. However, as a result of those recent amendments, one now speaks of "protection under the Bankruptcy Act", a concept which has been long known to American bankruptcy law but not known to Canadian bankruptcy law as expressed in the former version of the Act.

11 This explains in large part the frequent recourse in the past by debtor companies to the *Companies' Creditors Arrangement Act*,[FN2] (hereinafter the "CCAA"). The Act now has been reformed to bring it more in line with the spirit of the United States Bankruptcy Act, which we believe gives this Court even greater justification to refer to and to some extent rely upon American jurisprudence and authorities.

12 The attorney for the Trustee has brought to our attention a very well researched article published in the *California Law Review*[FN3] relative to Consolidations in matters of Bank-

ruptcy and the "Flow-of- Assets Approach". We read in that article[FN4] the following very interesting citation:

> An alternative theme of some recent case law is that the bankruptcy proceedings of affiliated corporations should be consolidated whenever it is impractical to separate their financial affairs. The outstanding example of this proposition is the majority opinion in *Chemical Bank New York Trust Company* vs. *Kheel* ...[FN5]

a decision of the second American Circuit Court of Appeals.

13 The enterprise in that case consisted of eight affiliates, which the Referee found were "operated as a single unit with little or no attention paid to the formalities usually observed in independent corporations ...". Upon motion by a major creditor, the assets and liabilities of the corporations were consolidated. Chemical Bank, a creditor of one of the stronger affiliates, appealed. The majority opinion in *Kheel* is said in that Article[FN6] to reflect the following proposition:

> If the relationships between affiliates are so obscured that it is impossible to disentangle their affairs, of course their bankruptcy proceedings should be consolidated. In such a situation even a simplistic reliance argument could not seriously be advanced.

14 Further on in that same Article, and in the actual *Kheel* case itself, the extract which is of interest[FN7] reads as follows:

> The debtor corporations are all owned or controlled by the former shipping magnate, Manuel E. Kulukundis. The Referee found that the debtor corporations were operated as a single unit with little or no attention paid to the formalities usually observed in independent corporations, that the officers and directors of all, so far as ascertainable, were substantially the same and acted as figureheads for Kulukundis, that funds were shifted back and forth between the corporations in an extremely complex pattern and in effect pooled together, loans were made back and forth, borrowings made by some to pay obligations of others, freights due some pledged or used to pay liabilities and expenses of others, and withdrawals and payments made from and to corporate accounts by Kulukundis personally not sufficiently recorded on the books.

15 That recitation reflects very closely the situation in the case of the Baron Group and specifically the five companies with which we are here concerned. It is interesting to note that the resolution of each participating company affixed to that Joint Banking Agreement, Exhibit R-2, is in all cases signed by the same Mr. B. Baillargeon, so that he can readily be seen to be the equivalent of Mr. Kulukundis in the American case cited above.

16 Also, the Trustee has testified here that the records became so hopelessly confused, and in many instances were non-existent, that it is impossible to know which fixed assets belong to which of those companies. People who did business with them, either as suppliers (therefore creditors) or customers (therefore debtors in respect of those accounts receivable),

were simply calling the Montreal office or Branch of that Group of companies, often without distinguishing among them, and were billed indiscriminately as among the Group of companies by the one which management felt was most expedient.

17 The evidence of the Trustee is also to the effect that, in this case, it is extremely unlikely that there will be any dividend for ordinary creditors. However, to the extent that there is any possibility, it is important that the Banks, which are secured, realize the maximum possible on their claims. If we were to oblige the Trustee to perform a separate body of work in respect of each of these five companies, thereby increasing the expenses of the bankruptcy and reducing the realisation by the secured creditors, that would only further diminish the already faint hope of any dividend to the ordinary creditors.

18 During the argument and the evidence, we expressed the concern that a creditor of one of those five companies who might stand to get a larger dividend on an individual company basis than through an intermingled and consolidated basis could be prejudiced, whereas other creditors in respect of other specific companies might be benefited by the mechanism of consolidation.

19 That first concern is largely diminished by the fact that the likelihood of realization is remote and that it would be an unnecessary waste of money, time and effort to oblige the Trustee to go through the full exercise in respect of each one of those five companies. Moreover, the Trustee must by next Monday, today being Friday, send out lists and Notices of the calling of the First Meetings of Creditors.

20 We understand that one meeting will be held in Toronto with respect to the two companies to which we referred as the "Toronto Branch" and another in Montreal with respect to the three to which we referred as the "Montreal Branch" and that, on a practical basis, it would be nearly impossible to distinguish without simply guessing which creditors relate to which specific one of those five companies. The Trustee and the attorneys on his behalf have presented these proceedings in order to be able to have one consolidated list of creditors used to send out the notices for those meetings.

21 It is important to note that the Act has no statutory provision dealing with Consolidations. Of interest also is the fact that the United States Bankruptcy Act has none either. Yet, in spite of the absence of any statutory authority for such a process, the doctrine and the Judgments of the Courts in the United States have adopted that approach where it is necessary and where to do otherwise would be impractical.

22 Another interesting analogy is the case of *Re Northland Properties Ltd.*[FN8] That case also involved a Group of companies and it was a plan of reorganization under the CCAA, which statute also does not contain a statutory provision authorizing Consolidation. There, the Consolidation for the purposes of that Law in respect of the group of companies whose affairs were intermingled in a similar fashion to that of the Baron Group here was approved by the Appeal Court of British Columbia.

23 There is also the consideration that in Bankruptcy matters the Court exercises an equitable[FN9] as well as a legal jurisdiction, and that practicality is always the order of the day. It

is frequently said in the jurisprudence that the Act is a "businessman's law" and that practical business considerations should not be disregarded, as they sometimes are in other domains where a strict interpretation of the law must be followed and observed.

24 The decision of this Court is to grant the request of the Trustee in this case. Hence, we wish to make clear that this in no way implies that the Registrar erred in his Judgment, from which this is an Appeal. Most of the evidence presented to us was not presented before him. He did not hear any witness, as we did, and, more importantly, the arguments in law and the jurisprudence, both Canadian and American, as well as the American doctrine, were not laid out before him due to the exigencies of *ex parte* procedures before the Registrar in this Jurisdiction.

25 It is therefore without in any way concluding that he erred in misinterpreting any part of the Act, since no specific provision of the Act was in play before him.

26 Moreover, in virtue of s. 187(5) of the Act, it is always open for this Court to review an Order or Judgment already rendered and to rescind, modify or revise it. Therefore, this Judgment will also require, in its Notice to all the creditors of the five companies, that the Trustee advise that by Judgment of the Court on this day, an Order was given consolidating the administration of the five bankruptcy estates.

27 This must be explained to the creditors at the two meetings, in terms of the reasons which underlay that decision, and it must be pointed out specifically to them that any creditor who feels itself or himself unjustly prejudiced by such a Consolidation may petition the Court pursuant to s. 187(5) to modify, vary, rescind or otherwise deal with or affect the present Judgment.

28 FOR THE REASONS GIVEN ORALLY AND RECORDED, THE COURT:

29 MAINTAINS the appeal in each of the five files;

30 REVERSES and ANNULS the decision of the Registrar in each of those five cases rendered by him on May 26, 1993 with respect to the "Motion for the Consolidation of the Administration of Bankruptcy Estates" dated May 21, 1993 in each of those files and, rendering Judgment on each of those five Motions of May 21, 1993;

31 GRANTS Judgment in accordance with the conclusions thereof;

32 ORDERS the Trustee to inform all Creditors of the five Bankrupt Companies of the present Judgment and generally of the reasons for same and moreover inform them of their right under s. 187(5) of the *Bankruptcy and Insolvency Act* to apply to the Court to review, rescind or vary this Order, if they allege a particular prejudice and can prove same;

33 THE WHOLE with costs against the mass.

Appeal allowed.

FN1 R.S.C. 1985, c. B-3.

FN2 R.S.C. 1985, c. C-36.

FN3 Volume LXV, p. 720.

FN4 At pp. 733 and 734.

FN5 369 F.2d 845 (2d Cir. 1966).

FN6 At pp. 734 and 735.

FN7 At p. 846.

FN8 (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122 (C.A.).

FN9 Section 183 of the Act.

END OF DOCUMENT

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3, AS AMENDED AND IN THE MATTER OF BANKRUPTCY OF Legacy NPC Partnership, of the City of Toronto, in the Province of Ontario

AND IN THE MATTER OF BANKRUPTCY OF 4514858 CANADA INC., of the City of Toronto, in the Province of Ontario

Court File No: 31-1423385

Court File No: 31-1423389

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE MOVING PARTY (MOTION RETURNABLE JANUARY 24, 2011)

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